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No. 09-460

In The
Supreme Court of the United States

Milwaukee Deputy Sheriff's Assciation and
Michael Schuh,
Petitioners,

v.

David A. Clarke Jr., and
Eileen Richards,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The questions presented by this case implicate the free speech rights of public employees across the United States. This case requires guidance from this Court to determine the appropriate amount of emphasis given to a public employee's motivation for speaking in determining whether he or she spoke on a matter of public concern. The free speech rights of public employees are further implicated by determining whether speech made by a public employee as a citizen, but based on information learned through public employment, is protected by the Constitution.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE SEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY FOCUSED ON MOTIVATION UNDER THE *CONNICK V. MYERS* TEST.

A. The Supreme Court of the United States has not allowed an employee's motivation for speech solely to determine whether that speech related to a matter of public concern.

Despite Respondents' suggestion to the contrary, the Petitioners have never argued that the context of employee speech is irrelevant under this Court's precedents. The argument contained in the Petition for Writ of Certiorari is that placing extensive emphasis on employee motivation for speech, and thereby allowing it to become dispositive, is improper.

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari apparently misses this point.

This Court has never applied *Connick v. Myers* to hold that speech purely motivated by personal interests is unprotected by the Constitution. (Pet. 11-16). Indeed, Ms. Myers' motivation in *Connick* was purely personal. 461 U.S. 138, 148-49 (1983). According to Respondents, "[t]he *Connick* decision also supports the proposition that certain statements, . . . will survive the threshold test even if the employee was partially motivated by personal concerns." (Br. Opp'n. 7). Petitioners agree, but contend that *Connick* goes even further, and stands for the proposition that even statements *completely* motivated by personal concerns can survive the threshold test.

The Petitioners disagree with the Respondents' analysis of *Rankin v. McPherson*. According to the Respondents, both the majority and dissent in *Rankin* focused on the employee's motivation for speaking. (Opp. Brief, 7). Both the majority and dissent, however, analyzed the context of the employee's speech and how it related to the specific words she spoke. 483 U.S. 378, 386-87, 396-97 (1987). The context was relevant in determining whether she spoke on a matter of public concern, not in determining her motivation for speaking.

The Respondents in no way address the analysis of three Supreme Court cases contained in the petition. All three cases: *United States v. National Treasury Employees' Union; City of San Diego v. Roe; and Garcetti v. Ceballos*, support the proposition that speech entirely motivated by personal interests can survive the threshold *Connick* inquiry. (Pet. 14-16).

B. The Seventh Circuit improperly focuses on the motivation for employee speech.

The Respondents' Brief quotes a portion of the Seventh Circuit's decision in support of their argument that the court correctly applied *Connick*. (Br. Opp'n. 8). The Seventh Circuit stated "that a public employee speaks out *in part* for personal reasons will not necessarily remove the speech from the scope of public concern." (App. 12) (emphasis added). This quote demonstrates the misapplication of Supreme Court precedent by the Seventh Circuit. Even if a public employee speaks out *solely* for personal reasons, the Petitioners contend that speech is not necessarily removed from the scope of public concern. The motivation for a public employee's speech is not determinative, as a court must evaluate the content, form, and context in order to determine whether that speech touched on a matter of public concern. *Connick*, 461 U.S. 138, 147-48 (1983).

As noted in both the Petition for Writ of Certiorari, and the Brief in Opposition to the Petition for Writ of Certiorari, the Seventh Circuit has stated that no factor is singularly dispositive under the *Connick* analysis, but that the "content" of the speech is the most important factor. (Pet. 19; Br. Opp'n. 6; App. 11). Despite these statements, however, the Seventh Circuit's legal reasoning has repeatedly, and incorrectly, focused on the motivation for employee speech. (Pet. 16-21).

The Seventh Circuit's analysis in the instant case demonstrates its misapplication of Supreme Court precedent. The Seventh Circuit found that two parts of the *Connick* test weighed in favor of finding that

Deputy Schuh's speech was on a matter of public concern, namely the form and content of the speech. (App. 13-14). After determining Deputy Schuh spoke with a purely personal motivation, the Seventh Circuit allowed motivation to trump form and content and determined Deputy Schuh was not speaking on a matter of public concern. (App. 19). As discussed above, even assuming Deputy Schuh was speaking with a purely personal motivation, that alone is not enough to disqualify his speech from protection.

C. The courts of appeals are in disarray over the proper application of *Connick*.

The Respondents misstate the argument contained in the Petition for Writ of Certiorari on this issue. The Petitioners do contend that several circuit courts have improperly emphasized the motivation of the speaker in applying *Connick*, but do not argue that other courts have completely ignored motivation. (Br. Opp'n. 10). Instead, the amount of emphasis given to motivation in the *Connick* analysis is the point on which the courts of appeals have split. The Petitioners contend that motivation can be relevant when performing the *Connick* test to determine whether the context of speech was on a matter of public concern, but should not be dispositive.

The cases cited in the Respondents' Brief in Opposition from the Eleventh Circuit actually support the argument that the Eleventh Circuit misapplies Supreme Court precedent. "[W]hen context and motivation are considered, even speech that, content-wise, lies near the core of the First Amendment's protection - archetypical public speech - may be deemed private speech." *Mitchell v. Hillsborough*

County, 468 F.3d 1276, 1284 (11th Cir. 2006) (*citing Morris v. Crow*, 117 F.3d 449, 457 (11th Cir. 1997)). *Morris* involved speech where only the content weighed in favor of protection, while the form and context weighed against. *Morris*, 117 F.3d at 457. The Eleventh Circuit assumed, without deciding, that the speech at issue was on a matter of public concern. *Id.*

The Sixth Circuit's decision in *Farhat v. Jopke* is another instance where the reasoning applied by the court does not match the standards it supposedly used to determine whether a public employee spoke on a matter of public concern. The Respondents' Brief in Opposition notes isolated statements made by the Sixth Circuit concerning the non-dispositve nature of the motivation for employee speech. (Br. Opp'n. 11-12). The legal reasoning applied by the court, however, focuses entirely on the motivation for the employee speech. *Farhat*, 370 F.3d 580, 593 (6th Cir. 2003).

The legal reasoning applied by the Tenth Circuit in *Maldonaldo v. City of Altus*, also does not conform to the standards the court of appeals set forth. The Tenth Circuit focused almost exclusively on whether the speech or the speakers at issue intended to communicate any message by speaking Spanish. *Maldonaldo v. City of Altus*, 433 F.3d 1294, 1310-13 (10th Cir. 2006). This analysis focused on the motivation for speaking.

Finally, the Respondents misstate the Petitioners' argument concerning the First, Second, and Fourth Circuits. The Petitioners do not contend that these courts of appeals fail to consider the motivation for speech. Rather, the Petitioners contend these courts

of appeals do not consider motivation dispositive in determining whether speech is on a matter of public concern. Motivation certainly is one aspect of the context inquiry, but it is not, and should not, be dispositive.

II. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE CONFIDENTIALITY POLICY CONSTITUTES AN IMPERMISSIBLE PRIOR RESTRAINT UNDER THE FIRST AMENDMENT.

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari fails to note the crucial distinction between the holding in *Garcetti v. Ceballos*, and the Seventh Circuit's decision in the instant case. Speech made pursuant to the job duties of public employees, according to *Garcetti*, is not entitled to First Amendment protection. *Garcetti*, 547 U.S. 410, 421 (2006). If Richard Ceballos' speech had merely concerned the subject matter of his employment, without being made pursuant to his job duties, then a full *Connick* analysis would have been required. *Id.*

The Respondents argue that the confidentiality policy is not an impermissible prior restraint on speech because the Seventh Circuit interpreted it narrowly. Specifically, the Seventh Circuit "found that it only applied to information grounded in the employee's official duties, which is not protected by the First Amendment." (Br. Opp'n. 16) (*citing Garcetti*, 547 U.S. at 421-22). This statement misconstrues the holding of the Supreme Court. *Garcetti* held that speech made pursuant to an employee's job duties is not spoken as a citizen, and therefore, the speech is not protected. 547 U.S. at 421. The case said absolutely nothing

about removing speech from protection if it is based on information learned through employment. A public employee can still speak as a citizen based on information learned through public employment, as long as the employee does not speak pursuant to his job duties.

CONCLUSION

For all the foregoing reasons in both this Reply Brief and the Petition for Writ of Certiorari, Petitioners respectfully request that the Supreme Court grant the petition and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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